Case No: 28-CA-213783

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

VALLEY HOSPITAL MEDICAL CENTER INC.
d/b/a VALLEY HOSPITAL MEDICAL CENTER

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS

CHARGING PARTY'S OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS

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The Charging Party, the Local Joint Executive Board of Las Vegas or the "Union," opposes, in part, the General Counsel's exceptions to the decision of the Administrative Law Judge. Both the General Counsel and the Union filed its exceptions to the Administrative Law Judge's Decision on November 16, 2018. While both the General Counsel and the Union generally agree on the First Exception listed in the General Counsel's brief,[1] the Union opposes the General Counsel's Second Exception on four grounds. First, footnote 28 to *Lincoln Lutheran* did not create a waiver standard any different than *Metropolitan Edison.* Second, the General Counsel's proposal is inconsistent with NLRB doctrine. Third, the Board should retain *Lincoln Lutheran* as a sensible application of well-established Board principles. Finally, the Board should decline to address any policies that were not implicated by the facts of this case.

A. *Lincoln Lutheran* does not create a separate waiver policy.

The General Counsel's Exceptions ask the Board to create an exception to the Board's current dues checkoff law by expanding *Lincoln Lutheran* footnote 28. (GC Excp., pp. 4-5.) That footnote provides:

> Today's holding does not preclude parties from expressly and unequivocally agreeing that, following contract expiration, an employer may unilaterally discontinue honoring a dues-checkoff arrangement established in the expired contract, notwithstanding the employer's statutory duty to maintain the status quo. That is, a union may choose to waive its postexpiration, statutory right to bargain over this mandatory subject of bargaining. Of course, for such a waiver to be valid, it must be "clear and unmistakable." *Metropolitan Edison* [*v. NLRB*, 460 U.S. 693, 708 (1983)].

Lincoln Lutheran, 362 NLRB No. 188, n.28 (2015).

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[1] Both the General Counsel and the Union agree that the Administrative Law Judge misapplied current Board law on clear and unequivocal waiver

The decision in *Lincoln Lutheran* did not invite the creation of a separate waiver standard for dues checkoff provisions. To the contrary, *Lincoln Lutheran* relied on the rock-solid principles of *Metropolitan Edison* that any waiver must be "clear and unmistakable." In its exception brief, the Union explained why the present language does not meet the Board's well-defined waiver standard. (Union Excep., pp. 5-10.) So, too, did the General Counsel. (GC Excep., pp. 3-4.) The standard that the General Counsel proposed on page 5 of its memorandum would violate the same principles that the General Counsel ably explained in pages 3-4 of its memorandum. The Board should not upend its Supreme Court-derived waiver doctrine.

B. The GC's "Plain meaning" Policy Does Not Make Doctrinal Sense.

The General Counsel's Exceptions ask the Board to invent a new policy based on the "plain meaning" of the agreement. (GC Excp., pp. 4-6.) Make no mistake: this would be a departure from the Board's clear and unmistakable waiver rule. Yet, as the Board explained in *Finley Hospital*, 362 N.L.R.B. No. 102 (2015), after the Board included dues checkoff in the standard unilateral change category, there is no basis for applying a waiver standard different than "clear and unmistakable." *Id.* at 4 n.7.

The General Counsel's proposal also ignores contract principles and employees' rights to enforce their own contracts. Employees' individual authorizations did not make their contracts with the Employer conditional on the existence of the CBA. (Union Excp., pp. 12-16.) The proposal undermines the principle of voluntary unionism—after all, the employee-members and *not* the company finance the union. The employees have the right to support a union if they choose and have a reasonable expectation that their decision will be respected.

Separately, "contract negotiations occurs in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated." *Hacienda Resort Hotel and Casino ("Hacienda I")*, 331 N.L.R.B. 665, 667 (2000)

(citing cases). The law at the time that the parties contracted included the Board's "clear and unmistakable waiver" doctrine, the Board's clear handling of durational contract language, the end of *Bethlehem Steel* based on *WKYC-TV, Inc.*, 359 N.L.R.B. No. 30 (2012), and three Ninth Circuit rulings in the *Hacienda* cases. (See Union Excp., pp. 1, 7, 10, 12.) When the parties entered into their contract agreement, they had no basis for believing that durational CBA agreement could artificially limit employees' authorizations.

C. *Lincoln Lutheran* is Sound Board Policy.

The General Counsel does not "argu[e] to disturb the rule set forth in *Lincoln Lutheran* that a dues checkoff may continue after contract expiration." (GC Excp., p. 4.) As a matter of policy, *Lincoln Lutheran* is a well-reasoned Board decision that brings consistency to the Board's unilateral change doctrine. As argued in the Charging Party's Exceptions, *Lincoln Lutheran* is a logical outgrowth of the *Katz* doctrine and of voluntary unionism principles. (Union Excp., pp. 11 – 13.) Like all other payroll deductions, postexpiration dues checkoff is now part of the unilateral change doctrine. *See King Radio Corp.*, 166 N.L.R.B. 649, 653 (1967), *enfd.*, 398 F.2d 14 (10th Cir. 1968) (deductions for savings bond); *Atlas Glass & Mirror Co.*, 273 N.L.R.B. 179, 179, 181 (1984) (deductions for pension program); *Wyndham Int'l, Inc.*, 330 N.L.R.B. 691, 693 (2000) (deductions for insurance policies); *Baton Rouge Water Works Co.*, 170 N.L.R.B. 1183, 1184 (1968) *enfd.* 417 F.2d 1065 (5th Cir. 1969) (dues checkoff pre-expiration).

Unilateral changes are categorized into three distinct levels. First, there are changes that occur as soon as the collective bargaining agreement expires, without bargaining. This first category covers a very small set of provisions based on explicit statutes. E.g., 29 U.S.C. § 158(d)(4); 29 U.S.C. § 158(a)(3); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 200-201 (1991); *Hilton-Davis Chem. Co*, 185 N.L.R.B. 241 (1970). There is no reason to group

dues checkoff in this first category because there is no statutory requirement to cease dues checkoff after the expiration of a CBA so long as the employees have an individual written authorization. *See Quality House of Graphics*, 336 N.L.R.B. 497, 512-513 (2001); *IBEW, Local 2088*, 302 N.L.R.B. 322 (1991); *Associated Press*, 199 N.L.R.B. 1110 (1972); *Lowell Corrugated Container*, 177 N.L.R.B. 169 (1969). If dues checkoff did expire automatically with the contract, then Valley Hospital's decision to continue dues checkoff would have been a felony under Section 302(a)(2).

Second, some changes that undermine the very process of collective bargaining may not be made unilaterally even after impasse. Again, this is a limited set of contract provisions that the Board has not applied to dues checkoff.

Finally, most postexpriation changes are changes that the employer may make after an impasse in negotiations. This is the *Katz* doctrine and the vast majority of changes fall into this category. It is the most appropriate category for the bulk of contract provisions, including dues checkoff. The Board should maintain the sounds policy at the heart of *Lincoln Lutheran.*

D. The Board Should Decline to Address Policies Not at Issue in this Case.

The General Counsel's memorandum invited the Board to reconsider its *Frito-Lay* rule, "[a]lthough not specifically at issue in this case." (GC Excp., p. 10.) *Frito-Lay* is long-standing Board policy, consistent with Section 302, harmonious with court doctrine, and a sensible interpretation of congressional intent. More to the point, as the General Counsel concedes, there is no factual record or trial record before the Board to support a reconsideration of the policy in the current case.

I. CONCLUSION

The Board should find that the Employer's unilateral termination of dues checkoff violated Sections 8(a)(5) and 8(a)(1).

November 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that the CHARGING PARTY'S OPPOSITION TO THE GENERAL COUNSEL' EXCEPTIONS in *Valley Hospital Medical Center Inc., d/b/a Valley Hospital Medical Center*, Case 28-CA-213783, was served via E-Filing and E-Mail, on this 30th day of November 2018, on the following:

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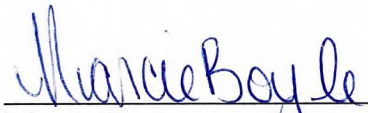

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